



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 25, 2016

Honorable James Lankford
Chairman
Subcommittee on Regulatory Affairs
and Federal Management
U.S. Senate Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Chairman Lankford:

Thank you for your letter of March 15, 2016, inquiring about the Office for Civil Rights' (OCR) plan to post on its website a list of educational institutions that have sought or received religious exemptions under Title IX of the Education Amendments of 1972 (Title IX), along with a copy of the institutions' request letters and OCR's response to each letter.

OCR's current process by which an educational institution requests and is granted an exemption under Title IX is dictated by the Department's Title IX regulations. Title IX prohibits discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance. The statute (at 20 U.S.C. § 1681(a)(3)) and its implementing regulations (at 34 C.F.R. § 106.12(a)) provide that Title IX does not apply to an educational institution controlled by a religious organization to the extent that application of Title IX would be inconsistent with the controlling organization's religious tenets. 34 C.F.R. § 106.12(b) provides that an educational institution that wishes to claim the exemption may do so by submitting in writing a statement from the highest ranking official of the institution, identifying the provisions of the Title IX regulations that conflict with a specific tenet of the religious organization that controls the educational institution.

OCR's current standard for evaluating whether an educational institution is controlled by a religious organization has been in place, unchanged, for nearly 40 years. OCR has stated that an educational institution will normally be considered to be controlled by a religious organization if one or more of the following conditions is true:

- (1) It is a school or department of divinity, defined as an institution or a department or branch of an institution whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation, or to prepare them to teach theological subjects; or

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The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

- (2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or
- (3) Its charter and catalog, or other official publication, contains an explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

An educational institution controlled by a religious organization is exempt from Title IX to the extent that compliance with Title IX would not be consistent with the religious tenets of the controlling organization. Once an institution receives an exemption, it need not reapply; the exemption remains valid unless it is withdrawn or rescinded based on a change in the institution's circumstances (such as no longer being controlled by a religious organization). OCR has no plans to change this current process by which an educational institution requests and is granted an exemption under Title IX.

Since October of 2014, OCR has received 35 requests for all or some subset of the religious exemption request and response letters under the Freedom of Information Act (FOIA). Although there are exemptions within FOIA that allow or require an agency to withhold certain information from otherwise releasable documents, OCR determined that these documents do not contain information that falls within these exemptions. Thus, the letters have been publicly released in their entirety and without redaction in response to the FOIA requests and will be produced on the website in the same manner.

The Department's authority to post these documents to further transparency is reflected in its statutory mandate to "inform the public regarding federally supported education programs." 20 U.S.C. § 1231a(2). In addition, FOIA expressly authorizes an agency to post documents on its website when they have been previously released under FOIA and the agency determines that, because of the subject matter of the documents, they "have become or are likely to become the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D). Consistent with longstanding guidance from the Office of Information Policy at the Department of Justice,¹ OCR has not adopted a specific threshold number of FOIA requests that would lead it to post documents online. In this case, the combination of the following factors led OCR to determine that it would be appropriate to post the documents on OCR's existing webpage regarding Title IX religious exemptions: the volume of requests for the religious exemption documents during a comparatively short period of time; the expectation that additional religious

¹ *OIP Guidance: Amendment Implementation Questions*, FOIA Update, Vol. XVIII, No. 1 (Jan. 1, 1997) ("The personnel of each FOIA office are in the best position to make this determination, on a case-by-case basis, based upon their familiarity with the subject matter of their FOIA-processed records, their knowledge of the FOIA requests that they have received in the past, and their best judgment as to the types of FOIA requests that they are likely to receive in the foreseeable future."), available at <https://www.justice.gov/oip/blog/oip-guidance-amendment-implementation-questions>.

exemption requests will be made, leading to additional FOIA requests; and the large number of responsive documents.

OCR is not using a contractor to perform this task. Department employees have prepared the documents for posting online, and likewise, will be responsible for uploading the documents and publishing the updated webpage. OCR believes that, in the long term, it will conserve staff resources by posting these documents online rather than simply responding to FOIA requests on a repeated basis.

OCR's website will continue, as it does today, to include an explanation of the religious exemption and its basis in both law and regulation; will continue to make clear that Title IX does not apply to an educational institution that is controlled by a religious organization to the extent that application of Title IX would be inconsistent with the religious tenets of the organization; and will continue to include information on how an educational institution can claim the religious exemption. Nothing on the website suggests that an institution's assertion of a religious exemption signifies that the institution has engaged in unlawful discrimination.

OCR currently intends to publish the updated webpage and documents in April 2016. Before doing so, OCR will provide advance email notice to the institutions whose documents will appear on the website.

I hope you find this information helpful. If you have any additional questions, please do not hesitate to contact Lloyd Horwich, Acting Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Catherine E. Lhamon
Assistant Secretary